No. 6593

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LI BING SUN,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

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FILED
JAN 20 1932
PAUL P. O'BRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

This appeal is taken from an order of the District Court for the Northern District of California, Southern Division, denying a petition for a writ of habeas corpus. (Tr. of R., pp. 27-28.)

The appellant, Li Bing Sun, a male Chinese alien, aged 26 years, first arrived in the United States on December 29, 1919, and was admitted on February 16, 1920, by the immigration authorities, under the status of a minor son of a Chinese merchant. *(Cheung Sum Shee v. Nagle,* 268 U. S. 336, 69 L. Ed. 985; *U. S. v. Gue Lim,* 176 U. S. 459, 44 L. Ed. 544.) Following his admission, he made two trips to China, as follows: departed on November 27, 1926, and returned on October 20, 1927; departed on November 22, 1929,

and returned on November 26, 1930. Prior to his departure on each of his trips, he secured from the immigration authorities a so-called laborer's return certificate, designated as Form 432, which was issued in each instance upon proof that he had property in the United States to the amount of, at least, one thousand ($1,000.00) dollars. (Tr. of R., p. 22 et seq.) He was admitted upon his return from his first trip in 1927 without question, but, upon his return from his second trip in 1930, it was decided by a Board of Special Inquiry, which had been convened at the port, that he was not entitled to admission and, upon appeal to the Secretary of Labor, the decision of the Board of Special Inquiry was affirmed. Having been ordered deported and held in custody by the appellee for deportation, proceedings in habeas corpus were instituted and, from the order of the Court below denying the petition for a writ of habeas corpus, this appeal comes.

The original immigration records were made a part of the appellee's return to an order to show cause in the Court below (Tr. of R., p. 26) and these records have been transmitted to this Court as part of the record on appeal. (Tr. of R., p. 35.)

REASONS FOR EXCLUSION.

The reasons for the exclusion of the appellant from admission to the United States, incident to his return to the United States on November 26, 1930, from his second trip to China, have been specified, as follows:

1. That he was not prevented from returning to the United States within one year from the date of his departure therefrom by reason of sickness or other disability beyond his control.

2. That he was not in possession of a so-called overtime certificate issued by an American Consular representative abroad showing that his failure to return to the United States within one year from the date of his departure therefrom was caused by sickness or other disability beyond his control.

In urging the foregoing reasons, the Secretary of Labor wrote, as follows:

"This case comes before the Board of Review of appeal from a decision of a Board of Special Inquiry at San Francisco denying admission as a returning laborer.

Attorney George W. Hott has filed a brief. Attorneys White and White at the port.

The record shows that after investigation the alien was issued a laborer's return certificate with which he departed from the port of San Francisco on November 22, 1929. Returning he arrived at San Francisco on November 26, 1930, four days over a year after his departure and without the overtime certificate which the law requires.

Asked why he did not return within the year, the applicant says he was suffering from boils on account of which he had to postpone his return. From communication of the American Consulate General at Hongkong, however, it appears that

the alien was physically examined at the Hongkong Consulate on August 14, 1930, by a Public Health Surgeon and certified as able to return to the United States. He himself testified that about October 7, 1930, he had recovered from his boil affliction. His United States Public Health Service Vaccination and Inspection Card shows that he was vaccinated on October 13, 1930, and reported on October 20, 1930, and again on October 21, 1930. Thus it appears that he had fully recovered from whatever may have been his physical disability in time for him to reach San Francisco well within the year after his departure from that port.

Asked why he did not present an overtime certificate, the alien stated that he had attempted to secure an overtime certificate but 'the American Consulate refused to issue it to him.' The State Department was requested to ascertain from the American Consulate General at Hongkong whether he had in fact refused an overtime certificate applied for by this alien. From the Consul's reply it appears that the alien did not go to the Consulate at all after the time had expired within which he could have reached an American port within the year. What the American Consul did refuse if anything was not an overtime certificate applied for when such application would be proper but an assurance that a (favorable) overtime certificate would be issued after the expiration of the year, this refusal being apparently in view of the fact that as stated above a physical examination of the alien showed him to be able to travel. This action at the Consulate was taken on August 14, 1930, when the alien had plenty of time to

reach San Francisco before the expiration of the year.

The Consul further states that on September 20, 1930, the alien applied by mail for an extension and was informed of the requirement of evidence of disability for the issuance of a (favorable) overtime certificate. The Consul adds 'No further record. Apparently (the alien) secured approval of his form for passage arriving in United States before November 22, 1930, and later changed (his) plans without reference this Consulate General.' However, it appears that the alien did go to the Consulate on October 20, 1930, for his Form 432 certificate bears the stamp 'American Consulate General, Hongkong, October 20, 1930,' and the written notation 'Sailing October 23, 1930, O. K. pnj' apparently the initials of Vice Consul Perry N. Jester. The significance of this 'O. K.' is obviously that this applicant gave his sailing date October 23, 1930, or as in his testimony he has said that he intended to sail on the 'President Grant' which was due to leave Hongkong October 23, 1930, which ship would have brought him to San Francisco within the year making his return satisfactory.

The real reason and the only reason for the alien's failure to arrive at San Francisco within the year after his departure from that port appears to be in his statement 'I expected to return on the President Grant but I thought that being four days overtime would not cause any difficulty in my landing,' i. e., in his case the law would not be enforced.

In the opinion of the Board of Review, the evidence does not establish that the alien was

prevented from returning to the United States by a cause beyond his control, or that he was refused a return certificate applied for at the proper time for such application, or that he is in any way exempted from the exclusion required by the Act of September 13, 1888, of a Chinese laborer who has not the overtime certificate required in that Act.

It is recommended that the appeal be dismissed.

Howard S. Eby,
Acting Chairman, Sec'y. and Comm.
Genl's. Board of Review.

EJW/ws
So Ordered:
P. F. Snyder,
Assistant to the Secretary."
(Immigration Records, Ex. "A," pp. 30-29.)

ISSUES IN THE CASE.

In behalf of the appellant, we contend, as follows:

1. That the finding of the immigration authorities that the appellant was not prevented from returning to the United States within one year from the date of his departure therefrom is without substantial evidentiary support and is, therefore, arbitrary.

2. That the appellant should not suffer the penalty of deportation for failure to present an overtime certificate issued by an American Consular representative abroad disclosing the facts pertaining to his disability, by which he claims to have been prevented from returning to the

United States within one year from the date of his departure therefrom, inasmuch as the facts show that he made application for such a certificate, but that the said Consular representative omitted to issue the document.

3. The appellant's right to admission to the United States was not necessarily prohibited through his failure to present a certificate of facts or overtime certificate issued by an American Consular representative.

ARGUMENT.

THE APPELLANT'S RIGHT TO ABSENT HIMSELF FROM THE UNITED STATES FOR A PERIOD OF, AT LEAST, ONE YEAR AND FOR AN ADDITIONAL PERIOD OF ONE YEAR UNDER CONDITIONS PRESCRIBED BY STATUTE.

The Act of Congress of September 13, 1888 (8 U. S. C. A., Sections 275, 276 and 277; 25 Stat. L. 476, 477), provides as follows:

> "Sec. 5. That from and after the passage of this act, no Chinese laborer in the United States shall be permitted, after having left, to return thereto, except under the conditions stated in the following sections.
>
> Sec. 6. That no Chinese laborer within the purview of the preceding section shall be permitted to return to the United States unless he has a lawful wife, child, or parent in the United states, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. * * *.

Sec. 7. That a Chinese person claiming the right to be permitted to leave the United States and return thereto on any of the grounds stated in the foregoing section, shall apply to the Chinese inspector in charge of the district from which he wishes to depart at least a month prior to the time of his departure, and shall make on oath before the said inspector a full statement descriptive of his family, or property, or debts, as the case may be, and shall furnish to said inspector such proof of the facts entitling him to return as shall be required by the rules and regulations prescribed from time to time by the Secretary of Labor, and for any false swearing in relation thereto he shall incur the penalties of perjury.

He shall also permit the Chinese inspector in charge to take a full description of his person, which description the inspector shall retain and mark with a number.

And if the said inspector, after hearing the proofs and investigating all the circumstances of the case, shall decide to issue a certificate of return, he shall at such time and place as he may designate, sign and give to the person applying a certificate containing the number of the description last aforesaid, which shall be the sole evidence given to such person of his right to return. * * *.

The right to return under the said certificate shall be limited to one year; but it may be extended for an additional period not to exceed a year, in cases where, by reason of sickness or other cause of disability beyond his control, the holder thereof shall be rendered unable sooner to return, which facts shall be fully reported to and

> investigated by the consular representative of the United States at the port or place from which such laborer departs for the United States, and certified by such representative of the United States to the satisfaction of the Chinese inspector in charge at the port where such Chinese shall seek to land in the United States, such certificate to be delivered by said representative to the master of the vessel on which he departs for the United States. * * *."

The statute, therefore, provides that an alien Chinese, who has a wife, child or parent in the United States or property therein in the amount of one thousand ($1,000.00) dollars, is entitled to a return certificate, which is commonly called a laborer's return certificate and which entitles him to go abroad for a period of one year and to absent himself from the United States for an additional period of one year, providing that, "by reason of sickness or other cause of disability beyond his control," he is unable to return to the United States within the original period of one year. The statute further provides that, in the event that the alien Chinese finds that on account of sickness or other disability beyond his control he is unable to return to the United States within the original period of one year, he shall report the facts pertaining to the disability to an American Consular representative, who shall investigate the facts and certify the same to the satisfaction of the immigration authorities at the port where the alien Chinese shall seek to enter the United States.

THE APPELLANT'S ABSENCE FROM THE UNITED STATES FOR A PERIOD OF MORE THAN ONE YEAR WAS DUE TO A DISABILITY BEYOND HIS CONTROL AND A CONTRARY FINDING BY THE IMMIGRATION AUTHORITIES WAS ARBITRARY.

As the facts show, the appellant departed from the United States for China on November 22, 1929, and returned on November 26th, 1930, a period of one year and four days having, therefore, elapsed between the date of his departure and the date of his return. As it must be conceded, in view of the clear language of the statute, that he had the right, under his laborer's return certificate, which he secured prior to his departure, to absent himself from the United States for, at least, one year, the question arises:

> "Was his entry upon his return necessarily prohibited by virtue of the fact that he was absent from the United States for a period of four days beyond the one year period prescribed by his laborer's return certificate?"

Obviously, the question should be answered in the negative, as the statute explicitly states:

> "The right to return under the said certificate (laborer's return certificate) shall be limited to one year; *but it may be extended for an additional period not to exceed a year, in cases where, by reason of sickness or other cause of disability beyond his control, the holder thereof shall be rendered unable sooner to return,* * * *."

Here, therefore, a preliminary inquiry should be made into the cause of the appellant's absence for a period of four days beyond the one year period prescribed

by his laborer's return certificate to ascertain whether or not this absence was due to "sickness or other cause of disability beyond his control."

The only evidence adduced before the Board of Special Inquiry, in respect to the cause of the appellant's absence from the United States, and particularly, in respect to his failure to return within one year from the date of his departure therefrom, consists in the testimony of the appellant, himself, and in certain documents which the appellant presented during the course of his examination. We take the liberty to quote the appellant's testimony, as follows:

> "Q. Did you live in the Hong Woo village continuously after reaching China until you departed for this country?
>
> A. Yes.
>
> Q. What occupation did you follow while you were last in China?
>
> A. I had no occupation during that period.
>
> Q. How many visits have you made to China as a laborer on Form 432?
>
> A. Two.
>
> Q. Did you know prior to leaving on both of those two visits that you must return to the U. S. within one year from the date of your departure?
>
> A. Yes.
>
> Q. What caused you to return to the U. S. after a year from date of departure?
>
> A. I was suffering from boils on my feet and on account of that I had to postpone my return to the U. S. I expected to return on the Pres. Grant but I thought that being 4 days overtime would not cause any difficulty in my landing.
>
> Q. When did the Pres. Grant leave Hongkong?

A. About the 30th. day of the 8th. month, this year, Chinese reckoning (October 21, 1930).

Q. When did you cease having trouble from boils?

A. About the 16th. day of the 8th. month (October 7, 1930).

Q. Then you deliberately delayed your return to the U. S. until the Pres. Cleveland sailed. Is that right?

A. I was detained for about 2 weeks in Hongkong on visits to the doctor for examination.

Q. Do you mean the U. S. Public Health doctor?

A. Yes.

Q. Have you any papers showing this to be a fact?

A. (Present certificate of L. C. Stewart, Medical Officer, U. S. P. H. S. certifying that Li Bing Sun, sailing today for San Francisco from Hongkong on the Pres. Cleveland has not been in contact during the last 14 days with anyone suffering from cerebro-spinal meningitis; also vaccination certificate and inspection card of U. S. P. H. S., Hongkong, showing Li Bing Sun, who departed Nov. 4, 1930, on Pres. Cleveland was vaccinated Oct. 18, 1930, and reported Oct. 20, and Oct. 21. This card bears applicant's photograph. Same are retained on file.)

Q. Was there an epidemic of spinal meningitis in Hongkong during the time you were there?

A. No.

Q. When you were in Hongkong did you go *to the American Consulate?*

A. Yes.

Q. Do you remember the date when you first went there?

A. It was before I went to the U. S. Public Health Service. It was about the 29th. day of the 8th. month (Oct. 20).

Q. You knew then that you could not return here on the Pres. Grant, did you not?

A. Yes.

Q. Why did you not get an overtime certificate from the Consul?

A. I attempted to secure an overtime certificate but the American Consul refused to issue it to me. He did not state any reasons for refusing to do so."

(Immigration Record, Ex. "A," pp. 4-5.)

The certificate of L. C. Stewart, Medical Officer, United States Public Health Service at Hongkong, China, to which reference has been made in the appellant's testimony, and which was introduced in evidence, reads as follows:

"This is to certify that Li Bing Sun bearer of passport No. .... sailing to-day for San Francisco per SS President Cleveland has complied with the provisions contained in Executive Order of June 21, 1929, and as far as can be ascertained he has not been in contact during the last fourteen days with anyone suffering from cerebro-spinal meningitis.

L. C. Stewart,
Medical Officer, United States Public Health Service."

(Immigration Record, Ex. "B," p. 2.)

Thus, according to his testimony, the appellant, during the latter part of his stay in China had been suffering from boils on his feet, by reason of which

condition he was unable to travel, that this condition existed until on or about October 7, 1930, and that he was thereafter detained at Hongkong, China, by a doctor of the United States Public Health Service for a period of fourteen days for physical examination. The documentary evidence, which has been heretofore mentioned, corroborates the appellant's testimony in respect to his detention and examination at Hongkong by the United States Public Health Service, the certificate of this service showing, as heretofore indicated, that the appellant had been under examination for a period of fourteen days, immediately prior to embarking for the United States, to determine whether or not he had been in contact with cerebro-spinal meningitis. The examination was evidently necessary and required under an Executive (Presidential) Order, as disclosed by the certificate, supra, of the United States Public Health Service, and, in passing, it may be said that this Executive Order extended to all aliens, who were about to embark for the United States, requiring them to be examined by the United States Public Health Service and to be held under observation for a period of fourteen days in order to make certain that they had not been afflicted with cerebro-spinal meningitis or been in contact with any person, who was afflicted, the purpose being manifestly to prevent the carrying of the disease to the United States. It further appears from the appellant's testimony that there was a vessel, the SS "President Grant," sailing from Hongkong for the United States on October *21*, 1930 (not October *23*, 1930, as stated by the Secretary of Labor in his de-

cision, supra), that the appellant did not take passage on this vessel, but waited for the next vessel, the SS "President Cleveland," which sailed from Hongkong on November 4, 1930, and arrived at San Francisco on November 26, 1930, or four days beyond the one year period prescribed by his laborer's return certificate.

We do not particularly rely upon the fact that the appellant has been suffering from boils, as a direct cause for his failure to return to the United States within one year from the date of his departure therefrom, inasmuch as he testified that this condition had cleared on or about October 7, 1930, and it may, therefore, be considered that he thereafter had ample time to reach the United States within the one year period, provided no circumstance intervened to delay his return. There is no question, however, as to the appellant being required to conform to the Executive Order requiring all aliens, who are about to embark for the United States to submit to medical observation and examination for a period of fourteen days, immediately prior to embarking for the United States, and this requirement, we contend, was the proximate and direct cause of his delay in returning to the United States. Manifestly, in the event that he had not been required to submit to examination and observation for a period of fourteen days, he would have been able to sail for the United States fourteen days prior to the time that he actually did and, therefore, instead of arriving in the United States four days after the expiration of the one year period prescribed by his return certificate, he would have arrived ten days

prior thereto, or, in other words, instead of sailing from Hongkong on November 4, 1930, on the SS "President Cleveland" and arriving at San Francisco on November 26, 1930, he would have been able to sail on October 21, 1930, on the SS "President Grant," which admittedly (decision of Secretary of Labor, supra), arrived at San Francisco well in advance of November 22, 1930, the date of the expiration of the one year period. To, again, quote from the certificate, supra, of the United States Public Health Service:

> "This is to certify that Li Bing Sun * * * sailing today for San Francisco per SS President Cleveland has complied with the provisions contained in Executive Order of June 21, 1929, and as far as can be ascertained he has not been in contact during the last fourteen days with anyone suffering from cerebro-spinal meningitis. * * *."

Inasmuch as the SS "President Cleveland" sailed from Hongkong on November 4, 1930 (see vaccination and inspection card, Immigration Record, Ex. "B," p. 3), it is accurately established that his detention by the United States Public Health Service began on October 20, 1930, and, therefore, inasmuch as this detention continued for fourteen days, it was not only impossible for him to sail on the SS "President Grant" on October 21, 1930, but it was, also, impossible for him to sail sooner than November 4, 1930, the date upon which he actually did take passage.

Clearly, therefore, if the facts establish, as we submit they do, that the appellant's delay in returning to

the United States of four days beyond the one year period prescribed by his laborer's return certificate, was due to the action of the United States Public Health Service at Hongkong in detaining him for examination and observation for a period of fourteen days, immediately prior to his embarkation for the United States, or from October 20, 1930, to November 4, 1930, it will necessarily follow that his delay was by reason of a disability beyond his control. He was powerless to interfere with the action and requirements of the United States Public Health Service or to escape detention by this Service.

The Secretary of Labor has concluded that the appellant had no substantial reason for absenting himself from the United States for a period of four days beyond the one year period prescribed by his laborer's return certificate and that his delay in returning was simply the result of a desire to remain longer in China, in the expectation that the law would not be enforced against him. The Secretary of Labor stated:

> "The real reason and the only reason for the alien's failure to arrive at San Francisco within the year after his departure from that port appears to be in his statement 'I expected to return on the President Grant but I thought that being four days overtime would not cause any difficulty in my landing,' i. e., in his case the law would not be enforced."

The Secretary, however, ignores and omits to quote a very pertinent part of the appellant's testimony, as follows:

"Q. Then you deliberately delayed your return to the U. S. until the Pres. Cleveland sailed. Is that right?

A. I was detained for about 2 weeks in Hongkong on visits to the doctor for examination.

Q. Do you mean the U. S. Public Health doctor?

A. Yes."

(See appellant's testimony, Immigration Record, Ex. "A," p. 4.)

No doubt, as he testified, the appellant intended to return on the SS "President Grant," which sailed from Hongkong on October 21, 1930, and which, admittedly, reached the United States prior to November 22, 1930, the date of the expiration of the one year period prescribed by his laborer's return certificate. However, owing to circumstances, over which he had no control and which we have already discussed, he was prevented from carrying out his intention. He evidently considered that these circumstances justified his delay in returning and, therefore, being impressed with the righteousness of his cause, he would naturally and properly state that he expected to experience no difficulty in securing admission. Viewed in the light of the entire record, which shows that there were circumstances justifying the appellant's delay in returning to the United States, we submit that no sinister motive should be imputed to the appellant merely because he expected to gain admission.

THE APPELLANT SHOULD NOT BE PENALIZED AND DEPORTED FOR FAILURE TO PRESENT AN OVERTIME CERTIFICATE ISSUED BY AN AMERICAN CONSULAR OFFICER, WHERE THE FACTS ESTABLISH THAT HE MADE APPLICATION FOR THE CERTIFICATE, BUT THAT THE CONSULAR OFFICER WRONGFULLY FAILED TO ISSUE THE SAME.

The Secretary of Labor further contends that the appellant was not entitled to admission for the reason that he did not present a so-called overtime certificate issued by the American Consul at Hongkong showing that his delay of four days, in returning to the United States, was caused by sickness or other disability beyond his control. It is conceded that the appellant did not present the certificate mentioned. In this connection, however, we urge that he should not be penalized and deported for not presenting the certificate, inasmuch as the facts establish that he made application for the document, but that the Consular Officer, in neglect of the duty imposed upon him by law, failed to issue it.

The appellant testified as follows:

"Q. When you were in Hongkong did you go to the American Consulate?

A. Yes.

Q. Do you remember the date when you first went there?

A. It was before I went to the United States Public Health Service. It was about the 29th. day of the 8th. month (October 20).

Q. You knew then that you could not return here on the SS President Grant, did you not?

A. Yes.

Q. Why did you not get an overtime certificate from the Consul?

A. I attempted to secure an overtime certificate but the American Consul refused to issue it to me. He did not state any reasons for refusing to do so."

(Immigration Record, Ex. "A," pp. 4-5.)

A reference to the documentary evidence of record corrobates the appellant's testimony, at least, to the extent that he went to the American Consulate at Hongkong on October 20, 1930, which is the date upon which his detention, for a period of fourteen days, by the United States Public Health Service began. The laborer's return certificate, upon which the appellant departed from the United States on November 22, 1929, was placed in evidence (Immigration Record, Ex. "B"), and on the reverse side of this certificate there appears a notation, as follows:

"American Consulate General October 20, 1930, Hongkong—Sailing October 23, 1930, O. K. p. n. j."

The Secretary of Labor, in his decision, supra, has commented upon the foregoing notation, as follows:

"* * *. However, it appears that the alien did go to the Consulate on October 20, 1930, for his Form 432 certificate bears the stamp 'American Consulate General, Hongkong, October 20, 1930,' and the written notation 'Sailing October 23, 1930, O. K. pnj,' apparently the initials of Vice Consul Perry N. Jester. * * *."

Taking, therefore, the direct testimony of the appellant, together with the notation of the Consular officer appearing on the laborer's return certificate, we

submit that it must be conceded that there was undisputed evidence establishing his claim that he appeared at the American Consulate at Hongkong on October 20, 1930, and made application to this Consulate for a so-called overtime certificate.

The applicable statute, namely, the Act of September 13, 1888, 25 Stat. L. 476, 477, supra, provides, in part, as follows:

> "The right to return under the said certificate (laborer's return certificate), shall be limited to one year; but it may be extended for an additional period not to exceed a year, in cases where, by reason of sickness or other cause of disability beyond his control, the holder thereof shall be rendered unable sooner to return, which facts shall be fully reported to and investigated by the consular representative of the United States at the port or place from which such laborer departs for the United States, and certified by such representative of the United States to the satisfaction of the Chinese inspector in charge at the port where such Chinese shall seek to enter the United States, such certificate to be delivered by said representative to the master of the vessel on which he departs for the United States. * * *."

Clearly, therefore, the *duty* is imposed upon a Consular officer to investigate the facts pertaining to the cause of delay, in returning to the United States within one year from the date of departure therefrom, of a Chinese alien, who is in possession of a laborer's return certificate, and to certify the facts pertaining to the delay to the satisfaction of the immigration officer in charge at the port where the alien seeks to

enter the United States. The certificate of facts of the Consular officer has been called an overtime certificate, which, however, is a misnomer, in that the Consular officer has no power whatever to issue a certificate granting or denying the alien an extension of his stay away from the United States, but his power is limited wholly to an investigation and certification of the facts pertaining to the delay, the decision as to whether or not the facts, as certified by the Consular officer, are true or constitute grounds sufficient to have justified the alien in remaining away from the United States for more than one year being a matter for determination by the immigration officer at the port of intended arrival.

> *Nagle v. Wong Bing Jung,* 22 Fed. (2d) 20, C. C. A. 9th;
>
> *Nagle v. Toy Young Quen,* 22 Fed. (2d) 18, C. C. A. 9th.

In respect to the *duty* of a Consular officer to investigate and certify the facts pertaining to the cause of delay, Judge Neterer, in *Ex Parte Woo Show How,* 17 Fed. (2d) 652, at page 653, D. C., said:

> "That the vice consul erred in denying the overtime certificate is concluded by the direction of the Department of State to the consul general in its instructions to direct the issuance of the certificate. The delay in returning was not caused by any intent on the part of the applicant to not return, but because of inability to travel by reason of ulcers, or boils, on his leg. *It was the duty of the vice consul, first, to investigate the facts of disability; second, to certify his findings to the*

satisfaction of the collector of customs at the port of entry, and deliver a copy to the master of the ship. The delay was not the fault of the applicant. The prompt discharge of official duty by the vice consul would have permitted entry within the limitation fixed by statute. The applicant may not be made to suffer because of the error of the vice consul, but be held accountable only for his own contract. Such clearly must be the intent of the statute, and so concluding, it is apparent applicant was denied a fair trial."

Ex Parte Yee Gee, 17 Fed. (2d) 653, D. C.

The appellant, of course, had no means by which to compel the Consular officer to perform the duty imposed upon him by statute and to, therefore, issue him a certificate of facts or so-called overtime certificate, as the result of his application of October 20, 1930, for such a document. The appellant, by making the application, complied with all the requirements of the law; the Consular officer, in failing to investigate the application and to certify the facts, as the result of his investigation, did not comply with any part of the law.

"Equity will consider that as done which ought to have been done," and it may, therefore, be deemed that the Consular officer issued to the appellant a certificate of facts or so-called overtime certificate, as the result of his application of October 20, 1930, for such a document.

In *Ex Parte Yee Gee,* 17 Fed. (2d) 653, at pages 655, 656 and 657, D. C., Judge St. Sure said:

"That part of the opinion appearing to be determinative of any facts on which the Board of Inquiry excluded, is expressed thus: 'This is probably true' (of the statements of detained for reasons for delay); and 'it is plain that equity is in favor of the admission of this Chinese as the only reason why he did not return within the two-year period * * * is a mistake on the part of a consular officer.' We may eliminate 'the reasons for extension being considered insufficient' from the Board of Inquiry summary on the appeal for this reason, and arrive again at the action of the consuls. Muccio's statement that the consulate was not satisfied with applicant's reasons for delay is that of a different vice consul, after instruction by the State Department following complaint of failure to exercise proper powers, and abuse and excess of authority by a different vice consul, Hawkins, in arbitrary refusal to grant a certificate, and is necessarily based on such arbitrary and mistaken refusal. Hawkins' refusal is not a certificate of facts required; Muccio's cannot be, and there was therefore practically nothing but the bare return certificate, coupled with the date of physical arrival at San Francisco beyond the time caused only by the mistake of the first vice consul acting, and in no wise the result of any neglect or failure of the applicant.

In the case of Woo Show How, W. D. Wash., No. 11175, 17 F. (2d) 652, Jan. 17, 1927, Judge Neterer said of a similar situation:

'The prompt discharge of official duty by the vice consul would have permitted entry within the limitation fixed by statute. The applicant may not be made to suffer because of the error

of the vice consul, but be held accountable only for his own conduct. Such clearly must be the intent of the statute, and, so concluding, it is apparent that applicant was denied a fair trial.'

With this I agree. *On the record as stated I also consider that though there is no estoppel against the government by reason of acts of its officers, the equity in the case will consider that as done which should have been done, and will therefore consider that the time of entry is within the time limit because actually prevented by recognized and corrected mistake or abuse of power by an officer not of the branch having actual authority to exclude.* * * *.

The expiration of the time limit, under the circumstances here, where the applicant has made every effort to secure his document on which to take passage, and where he was actually on an American ship bound for his return port before the expiration of the time limit, becomes of little consequence, and should be deemed to date back to March, when he was prevented from sailing."

Ex Parte Woo Show How, supra;

In Re Spinella, 3 Fed. (2d) 196, D. C.;

Ex Parte Seid Soo Hong, 23 Fed. (2d) 847, D. C.

It is apparently conceded, at least not denied, by the Secretary of Labor, that the appellant applied to the American Consulate at Hongkong on October 20, 1930, for an overtime certificate. However, he states that the appellant "did not go to the Consulate at all after the time expired within which he could have reached an American port within the year." Evidently, he

means that the application of October 20, 1930, to the Consulate, for a certificate of facts or overtime certificate was premature, or, in other words, it is virtually contended that inasmuch as twenty-four days are consumed in making the voyage from Hongkong to the United States, the appellant should have deferred his application until, at least, twenty-four days prior to November 22, 1930, the date of the expiration of the one year period prescribed by his laborer's return certificate. There is no authority for such a contention. Clearly, the statute contemplates the filing of the application at such time when the alien finds it impossible for him to return to the United States within the one year and, hence, on October 20, 1930, when the appellant found that he could not return within the one year period by reason of the fact of his detention for a period of fourteen days, commencing on October 20, 1930, by the United States Public Health Service, he acted within his rights by filing his application and as any prudent person would act.

The Secretary of Labor not only entirely ignores the appellant's detention by the United States Public Health Service for a period of fourteen days, immediately prior to his embarkation for the United States, as a ground for his delay in returning to the United States within the period of one year, but. also. ignores the fact that the appellant fully complied with the law by filing with the American Consul on October 20, 1930, his application for a Consular certificate of facts and that the Consul complied with no part of law in refusing to issue the certificate. Apparently, he places

his adverse decision wholly upon the grounds that the appellant had previously applied for overtime certificates on August 14, 1930, and on September 20, 1930, on the ground of physical disability, to-wit: boils on his feet, that the application of August 14, 1930, was denied, because the appellant was medically examined and found able to travel, and that the application of September 20, 1930, was never completed through the fault of the appellant in failing to produce a medical certificate requested by the Consul. In support of his adverse decision, he does not rely upon any evidence adduced before the Board of Special Inquiry, but entirely upon a communication received from the American Consul at Hongkong after the Board of Special Inquiry had rendered its decision and while the case was pending on appeal. This communication is dated January 15, 1931, and the appellant was denied admission by a Board of Special Inquiry on December 3, 1930. (Immigration Record, Ex. "A," pp. 8-9.) The communication reads as follows:

> "Li Bing Sun applied personally August 14, 1930, for assurance of favorable action on overtime certificate, after expiration one year, was examined by the U. S. Public Health Officer this office and certified able to return to the United States, was advised to return to San Francisco before November 22. On September 20th he applied by mail for extension and was informed of provisions of law concerning issuance of overtime certificates and the necessity of submitting proof of disability beyond control, in his case a medical certificate. No further record apparently re-

ceived approval of his form for passage arriving United States before November 22 and later changed plans without reference this Consulate General."

(Immigration Record, Ex. "A," p. 26.)

The communication, not having been produced at the hearing before the Board of Special Inquiry, by reason of which the appellant was not confronted with it, the Secretary of Labor acted unfairly in utilizing it as evidence. Speaking of the "indispensable requisites of a fair hearing," the Circuit Court for the Eighth Circuit in *Whitfield v. Hanges,* 222 Fed. 745, at page 749, said:

"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; *that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it."*

Chin Quong Mew ex rel. Chin Bark Keung v. Tillinghast, 30 Fed. (2d) 684, C. C. A. 1st;

Kwock Jan Fat v. White, 253 U. S. 454, 457-458, 40 Sup. Ct. 566, 567, 64 L. Ed. 1010.

In any event, the communication is immaterial, in that the information contained therein pertains only to the applications of August 14, 1930, and September 20, 1930, and not to the application of October 20, 1930, involving the proximate and direct cause of the appellant's delay through his detention by the United States Public Health Service. It is true that the communication indicates that the Consulate had no record of the appellant after September 20, 1930, but, nevertheless, the conclusion is not thereby justified that the appellant did not appear at the Consulate and make application for a certificate of facts or overtime certificate on October 20, 1930, not only on account of the direct testimony of the appellant that he did appear, but, also, on account of the notation of the Consular officer, himself, appearing on the reverse side of the appellant's return certificate (Immigration Record, Ex. "B"), and showing the appellant's appearance at the Consulate on the date mentioned.

Furthermore, as heretofore observed, the Secretary of Labor admits that the appellant did appear at the American Consulate on October 20, 1930, and, in connection with this appearance, he states:

> "* * * However, it appears that the alien did go to the Consulate on October 20, 1930, for his Form 432 certificate bears the stamp 'American Consulate General, Hongkong, October 20, 1930,' and the written notation 'Sailing October 23, 1930, O. K. pnj,' apparently the initials of Vice Consul Perry N. Jester. The significance of this 'O. K.' is obviously that this applicant gave his sailing date October 23, 1930, or as in his testi-

> mony he has said that he intended to sail on the 'President Grant' which was due to leave Hongkong October 23, 1930, which ship would have brought him to San Francisco within the year making his return satisfactory."

Of course, the action of the Consular officer in giving the appellant an "O. K." to sail on October 23, 1930, was an empty gesture, because he had no authority whatever to limit or extend the appellant's stay abroad or determine when the appellant should depart for the United States, but his power, as we have heretofore contended, was limited entirely to the issuance of a certificate of facts, the decision as to the sufficiency of the certificate and the right of the appellant to return and to be admitted to the United States being matters for determination by the immigration authorities. The statement of the Secretary of Labor that the appellant testified that he "intended to sail on the SS. 'President Grant,' *which was due to leave Hongkong on October 23, 1930,"* is not correct. He testified that the SS. "President Grant" sailed from Hongkong on October *21.* 1930 (Immigation Record, Ex. "A," p. 4), and his testimony is undisputed by any evidence. Therefore, the Consular officer's "O. K." for the appellant to sail on October 23, 1930, was absolutely ineffectual, there being no vessel sailing on that date, and, furthermore, there was no vessel sailing thereafter until November 4, 1930, the date upon which the appellant actually did take passage for the United States. In any event, the "O. K." given by the Consular officer to the appellant was certainly not

the certificate of facts to which the appellant was entitled and which, admittedly, he never received.

THE APPELLANT'S RIGHT TO ADMISSION TO THE UNITED STATES WAS NOT NECESSARILY PROHIBITED THROUGH HIS FAILURE TO PRESENT A CERTIFICATE OF FACTS OR OVERTIME CERTIFICATE ISSUED BY AN AMERICAN CONSULAR OFFICER.

Moreover, we submit that the presentation by the appellant of a certificate of facts or so-called overtime certificate issued by a Consular officer was not absolutely essential to his admission. The applicable statute, namely, the Act of September 13, 1888, 25 Stat. L. 476, 477, supra, explicitly provides that the holder of a laborer's return certificate, when he absents himself from the United States for a period of more than one year, shall report the facts pertaining to the cause of his absence to a Consular officer, who shall investigate the facts and *certify the same to the satisfaction of the immigration authorities.* In deciding, however, as we have heretofore urged, whether or not the holder of the laborer's return certificate was unavoidably delayed, the immigration authorities are not bound by the Consular certificate of facts, but they are at liberty to decide the question upon such testimony as may be adduced before them or upon any substantial evidence that may be presented, and this is, in effect, the view taken by this Court in its decisions in *Nagle v. Wong Bing Jung,* 22 Fed. (2d) 20, supra, and in *Nagle v. Toy Young Quen,* 22 Fed. (2d) 18, supra, in each of which cases it was held that the

immigration authorities were not bound by a statement of facts contained in a Consular certificate, but that they were free to decide whether or not the holder of a laborer's return certificate was unavoidably detained upon the testimony of the holder, as given before the immigration authorities.

If the immigration authorities are free to decide the question as to whether or not the holder of a laborer's return certificate was unavoidably delayed, upon the testimony as adduced before them and irrespective of the facts certified by the Consular officer, it must follow that the Consular certificate of facts is without binding or legal effect, that it is, at most, evidentiary in character and that its purpose is merely to serve as a guide for the immigration authorities in their determination of the case. In this situation, we submit that it was immaterial to the right of the appellant to enter the United States whether or not he had a Consular certificate of facts or overtime certificate, as long the immigration authorities had before them all the evidence showing and establishing the only fact, which was essential to his admission and which the Consular certificate would have showed, if issued, the fact being, as heretofore stated, his detention by the United States Public Health Service at Hongkong for a period of fourteen (14) days immediately prior to his embarkation for the United States.

In speaking of an immigration document, which was evidentiary in character, the Court in *U. S. ex rel. Patti v. Curran,* 22 Fed. (2d) 314, at page 317, said:

"Their permits under the immigration laws had no effect, except to furnish evidence in convenient form that they were returning from the temporary visit abroad. When the permits expired, it is true they were deprived of validity; *but, since their only effect was evidentiary, invalidity became utterly immaterial, upon the production of testimony establishing the only fact of which the permits, if they had been valid, would have been evidence.* * * *."

In *U. S. ex rel. Gentile v. Day,* 25 Fed. (2d) 717, C. C. A. 2nd, the Court, at page 719, said:

"All we have here is the question whether an alien loses his exemption from the quota for one reason merely because upon his arrival he gets an exemption for another. It is quite true that, if he had presented his present ground originally, the board of injury might have rejected it, but by hypothesis that rejection would have been wrong and should have been corrected on appeal. There is no reason to assume that the opportunities for examination at that time were better than before the inspector, or that the government was prejudiced by the delay in its opportunity to ascertain the facts. *The exemption is granted by the statute and is independent of the procedure for its determination; it should not be forfeited unless the alien's conduct has so clogged it that he ought not to assert it thereafter.* We cannot see that this is such a case."

The power having been vested by statute in the immigration authorities to accept or reject the Consular certificate of facts, the provision in respect to ob-

taining such a document must be held to be directory, rather than mandatory. In *French v. Edwards,* 20 L. Ed. 702, at p. 703, the Supreme Court said:

> "There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that prescribed. * * *."

CONCLUSION.

We respectfully submit that the testimony of the appellant and the documentary evidence of record established that the appellant's delay in returning to the United States of four days beyond the one year period prescribed by his laborer's return certificate was proximately and directly caused by his detention by the United States Public Health Service at Hongkong for a period of fourteen days, immediately prior to his departure for the United States, a matter over which he had manifestly no control. The immigration authorities had not a particle of evidence before them to justify the conclusion that the appellant was not delayed in the manner mentioned and, furthermore,

these authorities entirely ignored his detention by the United State Public Health Service, as an unavoidable circumstance causing his delay in returning to the United States. In this situation, it will follow that the decision of the immigration authorities to the effect that the appellant was not unavoidably delayed is arbitrary and unfair.

In *Johnson v. Tertzag,* 2 Fed. (2d) 40, at p. 41, C. C. A. 1st, the Court said:

> "The case is, on the facts, radically different from United States v. Commissioner (C. C. A.), 288 F. 756, relied upon by the government, where it appears (see page 758) that neither the alien 'nor the intended husband, in the testimony before the board, had a word to say as to religious persecution in Roumania.' This alien disclosed all essential facts before the board, making a plain case of fleeing from religious persecution.
>
> It is as much the duty of the immigration officials to admit aliens exempted from the general policy of exclusion as it is to exclude those falling within the excluded classes. Administrative officials may not ignore essential parts of the statutes they are administering."

The decision of the immigration authorities must be after a hearing in good faith, however summary, *Chin Yow v. U. S.,* 208 U. S. 8, 12, 52 L. Ed. 369, and it must find adequate support in the evidence.

Zakonaite v. Wolf, 226 U. S. 272, 274, 57 L. Ed. 218;

Kwock Jan Fat v. White, 253 U. S. 454, 457-458, 64 L. Ed. 1010.

Furthermore, the appellant should not be penalized and deported for failure to produce a Consular certificate of facts or overtime certificate, disclosing the grounds for his delay in returning to the United States. The record establishes that the appellant made application for the certificate mentioned on October 20, 1930, but that the Consular officer failed to issue the same. By making the application, the appellant complied with the law; in failing to issue the certificate, the Consular officer complied with no part of the law. "Equity will consider that as done which ought to have been done," and it may, therefore, be deemed that the appellant was in possession of the proper Consular certificate.

> *Ex Parte Yee Gee,* 17 Fed. (2d) 653, supra;
> *Ex Parte Woo Show How,* 17 Fed. (2d), 652, supra;
> *In Re Spinella,* 3 Fed. (2d) 196, supra;
> *Ex Parte Seid Soo Hong,* 23 Fed. (2d) 847, supra.

Moreover, a Consular certificate of facts or overtime certificate is purely evidentiary in character, in that it has no binding effect upon the immigration authorities, who are free to decide the alien's application for admission upon evidence adduced before them and irrespective of the facts disclosed by the Consular certificate.

> *Nagle v. Wong Bing Jung,* supra;
> *Nagle v. Toy Young Quen,* supra.

Being evidentiary in character, it was immaterial to the right of the appellant to enter the United States

whether or not he had a Consular certificate of facts or overtime certificate, as long as the immigration authorities had before them all the evidence showing and establishing the only fact, which was essential to his admission and which the Consular certificate would have showed, if issued, the fact being his detention by the United States Public Health Service at Hongkong for a period of fourteen days immediately prior to his embarkation for the United States.

U. S. ex rel. Patti v. Curran, supra;
U. S. ex rel. Gentile v. Day, supra.

The power having been vested by statute in the immigration authorities to accept or reject the Consular certificate of facts, the provision in respect to obtaining such a document must be held to be directory, rather than mandatory.

French v. Edwards, supra.

It is respectfully asked that the order of the Court below denying the petition for a writ of habeas corpus be reversed with direction to issue the writ as prayed for.

Dated, San Francisco,
January 18, 1932.

Respectfully submitted,
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